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Denise R. Gramme v. Andre Gramme : Petition For Rehearing and Supporting Brief of Plaintiff-Respondent

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

DENISE R. GRAMME,

Plaintiff and
Respondent,

vs.

ANDRE GRAMME,

Defendant and
Appellant.

Case No. 15420

PETITION FOR REHEARING AND SUPPORTING
BRIEF OF PLAINTIFF-RESPONDENT

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Respondent

FILED

DEC 4 1981

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DENISE R. GRAMME,	:	
Plaintiff and	:	
Respondent,	:	
vs.	:	Case No. 15420
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Defendant and	:	
Appellant.	:	

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	:	
ANDRE GRAMME,	:	
Defendant and	:	
Appellant.	:	

PETITION FOR REHEARING

The Plaintiff-Respondent above named, by and through her attorneys and pursuant to Rule 76 (e) of the Utah Rules of Civil Procedure, respectfully petitions the Supreme Court of the State of Utah for a rehearing in the above-entitled case on the following issue and upon the following grounds:

1. This Honorable Court filed its Decision in this matter on November 14, 1978, by which Decision this Honorable

Court affirmed, in its entirety, the Judgment of the Trial Court as requested by Plaintiff-Respondent; however, although Plaintiff-Respondent did not cross appeal the Judgment of the District Court, Plaintiff-Respondent did request that the Supreme Court award to her attorney's fees in defending the appeal of Defendant-Appellant and that this case be remanded to the District Court for a determination of the amount of the attorney's fees.

2. That the Decision of the Supreme Court filed in this matter on November 14, 1978, does not address the issue of attorney's fees on appeal, and it is respectfully submitted that this Honorable Court should have awarded to Plaintiff-Respondent her attorney's fees on this appeal and remanded this case to the District Court for a determination of the amount of such attorney's fees.

Respectfully Submitted,

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and
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Attorneys for Plaintiff-
Respondent

BRIEF IN SUPPORT OF REHEARING

STATEMENT OF FACTS

1. On August 24, 1977, the Trial Court entered its Judgment in this matter awarding to the Plaintiff on her Complaint a divorce, and also, awarding to the Defendant on his Counterclaim a divorce. The Judgment of the Trial Court divided between the parties the real and personal property acquired during the marriage, awarded Plaintiff attorney's fees and costs, and also awarded to the Plaintiff alimony. (Decree of Divorce, R. 127).

2. That Plaintiff-Respondent did not cross appeal the Judgment of the Trial Court; however, Plaintiff-Respondent did request that the Supreme Court award to her attorney's fees incurred in defending the Appeal of the Defendant-Appellant and requested that this Case be remanded to the District Court for a determination of the amount of attorney's fees incurred by Plaintiff-Respondent on this Appeal. (Respondent's Brief, page 43).

3. That the Decision of this Honorable Court filed November 14, 1978, does not address the issue of attorney's fees on Appeal.

ARGUMENT

POINT I

THIS HONORABLE COURT SHOULD HAVE AWARDED TO PLAINTIFF-RESPONDENT HER ATTORNEY'S FEES INCURRED AS A RESULT OF DEFENDANT-APPELLANT'S APPEAL, AND THIS CASE SHOULD HAVE BEEN REMANDED TO THE DISTRICT COURT FOR A DETERMINATION OF THE AMOUNT OF SUCH ATTORNEY'S FEES.

Section 30-3-3, Utah Code Annotated (1953), as amended, allows an award of attorney's fees to the wife, or the husband, so as to enable such party to prosecute or defend the divorce action. Under this Section, this Court has held that reasonable attorney's fees may be awarded on appeal. (See Dahlberg v. Dahlberg, 77 U. 157, 292 P. 214; Hendricks v. Hendricks, 91 U. 564, 65 P.2d 642; Peterson v. Peterson, 112 U. 542, 189 P.2d 961.

In this matter, as in most divorce cases, neither party was fully satisfied with the Judgment of the Trial Court; however, Plaintiff-Respondent chose not to appeal the Trial Court's decision in order to avoid further costs and attorney's fees in this matter. However, Defendant-Appellant did appeal the Trial Court's decision, thus placing the Plaintiff-Respondent in a position where it was necessary for her to incur additional attorney's fees, and in fairness to the Plaintiff-Respondent, she should not be burdened with additional attorney's fees which she attempted to avoid by not appealing the Trial Court's

decision. In the recent case of Eastman v. Eastman, 558 P.2d 514 (1976), the Defendant-Husband appealed the decision of the Trial Court, and the Plaintiff-Wife cross appealed and asked for a further award of attorney's fees for services rendered on the appeal. This Court affirmed the decision of the Trial Court; however, the case was remanded to the District Court to determine whether considerations of equity and justice required making of a further award of attorney's fees, and if so, how much. In the Eastman case, the fact that both parties had appealed the decision of the Trial Court concerned this Court as to awarding further attorney's fees, and apparently on that basis, this Court remanded to the District Court first, the issue of whether or not further attorney's fees should be awarded to the Plaintiff-Wife, and secondly, if considerations of equity and justice required making a further award of attorney's fees, the amount thereof.

In the instant case, as is set forth above, the Plaintiff-Respondent did not cross appeal the District Court's decision, however, she had no choice but to incur further attorney's fees in defending the appeal of Defendant-Appellant, and it is respectfully submitted that this Honorable Court should require the Defendant-Appellant to pay the attorney's fees incurred in this appeal.

CONCLUSION

This Court has held that attorney's fees in a divorce action such as this may be awarded on appeal, and Plaintiff-Respondent requested in her Brief that she be awarded attorney's fees on this appeal. The Decision of this Honorable Court filed on November 14, 1978, does not address the issue of awarding attorney's fees on appeal, and it is respectfully submitted that Plaintiff-Respondent should be awarded her attorney's fees incurred on this appeal and that this matter should be remanded to the District Court for a determination of the amount of such attorney's fees.

Based on the foregoing, this Honorable Court should grant a Rehearing.

Respectfully Submitted,

MARK C. McLACHLAN

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and

RALPH J. HAFEN

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Salt Lake City, Utah 84101

Attorneys for Plaintiff-
Respondent

CERTIFICATE OF SERVICE

I hereby certify that I hand delivered three (3) copies of the foregoing Petition for Rehearing and Supporting Brief of Plaintiff-Respondent to Joel M. Allred, Attorney for Defendant-Appellant, at 345 South State, Suite 101, Salt Lake City, Utah 84111, this 4th day of December, 1978.

MARK C. McLACHLAN